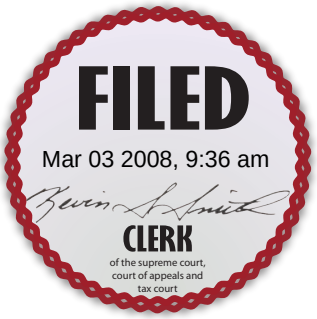

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IN THE
COURT OF APPEALS OF INDIANA

JANET WILKE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-0708-CV-690
	)	
ERIE INSURANCE, FINK & COMPANY, INC., and LAST CHANCE WRECKER & SALES, INC.,	)	
	)	
Appellees.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick McCarty, Judge
Cause No. 49D03-0608-CT-033875

March 3, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Janet Wilke ("Wilke") filed suit in Marion Superior Court against Erie Insurance Company ("Erie"), Fink and Company, Inc. ("Fink"), and Last Chance Wrecker and Sales, Inc. ("Last Chance"). Although Erie and Last Chance were ultimately dismissed from the suit, the trial court granted Wilke's motion for default judgment against Fink. Upon Fink's motion, however, the trial court set aside the default judgment. Wilke now appeals and presents three issues, which we consolidate and restate as the following dispositive issue: whether the trial court abused its discretion in granting Fink's motion to set aside default judgment. Concluding that it did not, we affirm.

Facts and Procedural History

On May 2, 2006, Wilke was involved in an automobile accident with one of Fink's employees. Consequently, on August 16, 2006, Wilke filed a pro se complaint naming Fink, Erie (Fink's insurer), and Last Chance as defendants. On August 25, 2006, an attorney representing both Erie and Fink filed an appearance. That same day, this attorney filed a motion to dismiss as to Erie and a motion for enlargement of time, requesting until October 8, 2006 to file an answer. On September 5, 2006, Wilke filed a motion for enlargement of time, apparently needing more time to respond to Erie's motion to dismiss. The trial court granted this motion, giving Wilke until October 9, 2006 to respond, and Wilke filed her response to Erie's motion to dismiss on October 5, 2006. The trial court did not immediately rule on Erie's motion to dismiss. On October 6, Erie filed an offer of judgment. On October 20, 2006, Wilke filed a motion to amend her complaint, which the trial court granted on November 11, 2006. On November 20, 2006, an attorney representing Wilke filed an appearance.

On January 2, 2007, Fink filed an answer to Wilke's complaint along with a motion in opposition to default judgment. The answer and motion were in response to a motion for default judgment which Wilke had mailed on December 26, 2006, but not via the methods set forth in Trial Rule 5(F)(3). In light of his response, Fink obviously received a copy of Wilke's motion before it was marked as filed on January 5, 2007. In her motion for default judgment, Wilke argued that she was entitled to default judgment against Fink because he had yet to file an answer to her complaint, which was true when Wilke mailed her motion but not true by the time the motion was marked as filed.

On January 18, 2007, the trial court granted Erie's motion to be dismissed as a party.[1] On January 25, 2007, despite the fact that Fink had already filed an answer, the trial court granted Wilke's motion for default judgment against Fink. Fink responded to this by filing a motion to set aside the default judgment on February 13, 2007. A hearing on this motion was held on June 25, 2007. On June 29, 2007, the trial court granted Fink's motion to set aside the default judgment. Wilke now appeals pro se.

Discussion and Decision

Wilke claims that the trial court erred in setting aside the default judgment against Fink.[2] Pursuant to Indiana Trial Rule 55(A) (2003), "When a party against whom a

[1] On July 27, 2007, the parties filed a "stipulation of dismissal" as to defendant Last Chance, which the trial court approved on July 31, 2007. Although Wilke briefly complains that her trial counsel should have challenged the dismissal of Erie, she does not fully develop her argument or cite any authority in support thereof. We therefore do not address this issue. This left Fink as the only defendant and now the only active appellee.

[2] Wilke's appellate arguments can be consolidated into two issues. However, because we ultimately conclude that the trial court did not abuse its discretion in setting aside the default judgment, we need not address Wilke's claims that the trial court should have held a damages hearing after it granted her motion for default judgment.

judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules and that fact is made to appear by affidavit or otherwise, the party may be defaulted." Pursuant to Indiana Trial Rule 55(C), a default judgment may be set aside by the trial court "for the grounds and in accordance with the provisions of Rule 60(B)." The grant or denial of a default judgment is a decision within the trial court's discretion. Precision Erecting, Inc. v. Wokurka, 638 N.E.2d 472, 473 (Ind. Ct. App. 1994), trans. denied. Likewise, we give substantial deference to the trial court's decision regarding whether to set aside a default judgment. Id. at 474. A default judgment is not generally favored, and any doubt of its propriety must be resolved in favor of the defaulted party. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001). A default judgment is an "extreme remedy" available only where a party fails to defend or prosecute a suit; it is not a trap to be set by counsel to catch unsuspecting litigants. Id.

In the present case, Wilke claims that because Fink failed to file an answer within the twenty-day time limit specified in Indiana Trial Rule 6(C) and did not receive an enlargement of time to file an answer after the twenty-day time limit, she was entitled to default judgment against Fink. Fink acknowledges that he did not file an answer within the time limits of Trial Rule 6(C). He claims, however, that he did not totally fail to appear or defend against Wilke's claims. Specifically, Fink notes that his trial counsel filed an appearance on behalf of him and his insurer, a motion for enlargement of time, and, more importantly, a motion to dismiss his insurer as a party. Fink claims that his trial counsel was waiting for a ruling on his motion to dismiss before he filed his answer

because the content of an answer was dependent upon whether or not the trial court granted the motion to dismiss.

Wilke claims that Indiana Trial Rules 55(A) and 6(C) require a party to file a responsive pleading and argues that a motion to dismiss is not a pleading. In support of her position, Wilke cites State Exchange Bank of Culver v. Teague, 495 N.E.2d 262, 267 (Ind. Ct. App. 1986), wherein the court stated that "a motion is not considered a pleading." However, Teague is not entirely on point, as the court made this statement in the context of determining when the issues before the trial court closed. Id.

More on point is Morton-Finney v. Gilbert, 646 N.E.2d 1387, 1388 (Ind. Ct. App. 1995), trans. denied, wherein the plaintiff appealed, arguing that the trial court had erred in denying her motion for default judgment. In affirming the trial court's decision, the Gilbert court noted that the defendant had filed a motion to dismiss pursuant to Trial Rule 12(B)(6). Id. As explained by the Gilbert court, "[a] motion to dismiss . . . is a proper responsive motion" and because the defendant had filed a motion to dismiss, the trial court was within its discretion to deny the plaintiff's motion for default judgment. Id.

Here, Fink's trial counsel had filed a motion to dismiss as to co-defendant Erie. Thus, as in Gilbert, there was some sort of responsive motion before the trial court at the time that it ruled on Wilke's motion for default judgment.[3] More importantly, Fink's trial counsel not only filed a motion to dismiss; he also filed, albeit belatedly, an answer to

[3] Wilke argues that the motion to dismiss, which involved only Erie, should not act to excuse Fink's failure to file a timely answer. However, Fink and Erie were not only represented by the same counsel, Erie was also Fink's insurer. Although we do not condone Fink's failure to file a timely answer, we are not unsympathetic to his argument that he was simply waiting for the trial court to rule on the motion to dismiss his insurer before filing his answer.

Wilke's claim. Indeed, this answer was actually filed *before* Wilke's motion for default judgment was filed. Although Wilke apparently mailed her motion for default judgment on December 26, 2006, her trial counsel admitted that such motion was not properly "filed" by mail pursuant to the applicable rule.[4] Because Wilke did not follow the proper procedure in filing her motion for default judgment, the trial court properly marked the motion as filed on January 5, 2007—*after* Fink had filed his January 2 answer to Wilke's complaint.

Thus, at the time the trial court ruled on Wilke's motion for default judgment, Fink's trial counsel had filed an appearance, a motion to dismiss with regard to Erie, a motion for enlargement of time, and an answer to Wilke's complaint. Under these facts and circumstances, we certainly could not fault the trial court had it decided to deny Wilke's motion for default judgment. As noted by Professor Harvey, when a defendant appears in person or by counsel and "files a timely answer to the complaint, or files a motion" then "'it is virtually impossible'" for the moving party to establish that the other party has failed to plead and receive default judgment on this ground. 3A William F.

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[4] Indiana Trial Rule 5(F)(3) (2003 & Supp. 2007) reads:

> The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:
> (1) Delivery to the clerk of the court;
> (2) Sending by electronic transmission under the procedure adopted pursuant to Administrative Rule 12;
> (3) Mailing to the clerk by registered, certified or express mail, return receipt requested;
> (4) Depositing with any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed; or
> (5) If the court so permits, filing with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.
>
> Filing by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit.
>
> Any party filing any paper by any method other than personal delivery to the clerk shall retain proof of filing.

Harvey, Indiana Practice § 55.4 (3d ed. 2002) (quoting Sportsman's Paradise, Inc. v. Sports Center, Inc., 424 N.E.2d 1073, 1075 (Ind. Ct. App. 1981)). Although Fink's answer was not timely, it was marked as filed before Wilke's motion for default judgment. As explained in Sportsman's Paradise, "any answer filed before the motion for default is sufficient to avoid default . . . even though the answer is untimely filed pursuant to [Trial Rule] 6." 424 N.E.2d at 1075.

In the present case, however, the trial court initially granted Wilke's motion for default judgment even though Fink had filed an answer. As the trial court explained at the hearing on Fink's motion to set aside default judgment, at the time the trial court ruled on the motion for default judgment, the filings "may have been out of sequence there, and probably when I went in here I didn't see anything in opposition and didn't go far enough down." Tr. p. 4. When the trial court was apprised of the situation by Fink's motion to set aside default judgment, the court correctly decided that the earlier grant of default had been mistaken. See Sportsman's Paradise, 424 N.E.2d at 1075. We certainly cannot say that the trial court's decision to set aside the default judgment was an abuse of the trial court's broad discretion in such matters, especially given our preference to decide issues upon their merits. See Ross v. Bachkurinskiy, 770 N.E.2d 389, 392 (Ind. Ct. App. 2002) (when deciding whether to grant a default judgment, the trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits).

Wilke also claims that Fink failed to establish that he had a meritorious defense. See Watson, 747 N.E.2d at 548 (a party seeking to set aside a default judgment must

make a prima facie showing of a meritorious defense). Wilke is correct that Fink's motion to set aside the default judgment did not specifically mention a meritorious defense. However, at the time he filed the motion to set aside, Fink had already filed an answer to Wilke's complaint, which denied liability. Therefore, the trial court had before it filings which advised it that Fink had a meritorious defense. See State Farm Mut. Auto. Ins. Co. v. Hughes, 808 N.E.2d 112, 118 (Ind. Ct. App. 2004) (reversing trial court's denial of intervening insurer's motion to set aside default judgment even though motion to set aside failed to specifically plead meritorious defense, but motion to intervene when read in conjunction with motion to set aside adequately advised trial court that intervenor had meritorious defense).

Under the facts and circumstances before us, the trial court did not abuse its discretion in granting Fink's motion to set aside the default judgment. Because the trial court did not err in setting aside the default judgment, we need not address the question of whether the trial court should have scheduled a damages hearing when it granted default judgment.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.